

BRAND, LOWELL & RYAN

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May 10, 1996

BY HAND DELIVERY

Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

AOR 1996-25

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COMMISSION
OFFICE OF GENERAL
COUNSEL
MAY 10 4 02 PM '96

Re: Advisory Opinion Request

Dear Sir or Madam:

We represent the Seafarers Political Activity Donation ("SPAD"), the federally registered separate segregated fund of the Seafarers International Union ("SIU"). SPAD mainly raises contributions from SIU members through a voluntary check off program. Pursuant to 2 U.S.C. § 437f, we seek an advisory opinion concerning the application of a discrete portion of the Commission's newly amended "best efforts" regulation, 11 C.F.R. § 104.7(b), to SPAD's check off program.

Advisory Opinion Sought

We hereby respectfully petition the Federal Election Commission to issue an advisory opinion that SPAD has made the requisite "best efforts" to identify its check off contributors of over \$200 in a year, provided SPAD follows the procedures outlined in 11 C.F.R. § 104.7(b) to obtain each individual check off contributor's name, address, and occupation. We acknowledge the Commission's "best efforts" regulation also facially requires a political committee to seek to ascertain the identity of a contributor's employer; however, SPAD's check off contributors are itinerant merchant seamen without permanent employers. For the reasons set forth in more detail below, such employer information would rarely, if ever, be current or possible to obtain for these contributors. Indeed, based on the unique circumstances of inland and deep sea employment, strict adherence to "best efforts" is more likely to yield inaccurate information concerning a seaman's current employer. Mariners' check off authorization forms are, moreover, generally executed and their contributions are generally made at times when these individuals are between jobs. Neither the Federal Election Campaign Act nor Commission regulations preclude the Commission

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from "fine tuning"¹ its "best efforts" requirements in this individual case. "It is well-established that an agency's authority to proceed in a complex area . . . by means of rules of general application entails a concomitant authority to provide exemption procedures in special circumstances." United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755 (1972).

In the event that SPAD must complete the employer box of its FECA disclosure forms for its itinerant merchant mariner check off contributors, we would ask the Commission also to opine that SPAD may report, most accurately, that the contributor is employed by "various U.S.-flag vessel operators."

Factual Background

SPAD Has Improvised a Union Side Check Off Program to Address the Unique Issues Involved in Operating Such a Program for an Itinerant Workforce of Merchant Mariners

The SIU represents merchant seamen and boatmen aboard U.S.-flag vessels on the high seas, the Gulf of Mexico, and inland lakes and waterways. Almost all of these merchant seamen and boatmen are employed through what is known as "rotary" crewing: SIU regional hiring halls refer union members for periodic employment with SIU-contracted companies. Once referred, an individual merchant seaman or boatman will generally work for a shipping company employer only for the duration of a trip at sea. A trip lasts only a few months, and oftentimes even a shorter duration. After the trip concludes, the SIU member returns to the "beach," places his or her name on the hiring hall's list of individuals waiting to ship; and returns to work some time later, most often for a different employer, once he or she has reached the top of the hiring hall list.

The periodic and ever-changing nature of maritime employment precludes SPAD from operating a conventional labor organization separate segregated fund check off program. In most other union check off programs, an employer deducts a pre-determined portion of a member employee's salary and then remits these funds to the separate segregated fund. An employer check off plan requires reasonably steady employment relationships to be viable, however. As a practical matter, a participating employer cannot implement a check off program for a revolving workforce. Moreover, such longer term employment relationships are necessary to enable employees' modest (usually) weekly or monthly periodic check off

¹ See Nat'l Rural Telecom Ass'n v. F.C.C., 988 F.2d 174, 181 (D.C. Cir. 1993) ("waiver processes are a permissible device for fine tuning regulations").

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contributions to accrue over time. A traditional employer level check off plan is thus not feasible for mariner contributions to SPAD.

For these reasons, SPAD's check off contributions are remitted from a participating employee's share of the SIU's permanent, employer-funded vacation plan, and not from individual SIU-contracted employers. Pursuant to its collective bargaining agreement with the SIU, an employer must make a payment to the SIU vacation plan on behalf of each SIU member that it has employed. An employer's vacation plan payment for an individual union member corresponds to the length of his or her employment with that company. Provided other eligibility criteria are met, an SIU employee may request vacation pay at the conclusion of his or her trip at sea, whereupon the SIU vacation plan will issue the employee one lump sum check comprising all the vacation pay to which he or she is entitled.² For its part, SPAD solicits an SIU employee to voluntarily check off a portion (usually fifty cents) of each day of employment for which he or she applies for vacation pay. This approach surmounts the logistical barriers preventing SPAD from maintaining a check off arrangement with individual SIU-contracted employers.

Our advisory opinion request pertains to the information that SPAD seeks from these individual SIU member check off contributors. SPAD's solicitation asks each participating employee to provide his or her name and address, and the contributors generally provide this information. (The SIU's vacation plan has this information on file in any event.) SPAD also knows the SIU vacation plan check off contributors' occupations -- they are all merchant mariners. Using this information, SPAD discloses the name, address, and occupation of any check off contributor whose annual contribution exceeds \$200.

Due to impracticability of keeping track of employers in the rotary crewing system described above, SPAD does not, however, ask a participating employee to identify his or her employer on its check off authorization form. Nor does SPAD independently seek this information from an employee whose annual contribution exceeds \$200.

² **The vacation plan represents an important benefit of SIU membership. It provides an SIU member with a supplemental benefit for the (increasingly) protracted period that he or she may be "on the beach" awaiting his or her next job.**

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Justification for the Advisory Opinion Requested

The Commission Should not Interpret its Regulations to Impose a Hollow and Burdensome Requirement that SPAD Seek Information that is Valueless and Out-of-Date, If It Can Be Acquired At All

Neither the nature of maritime employment in general nor the practicalities of SPAD's check off system provide SPAD any reasonable and meaningful way to seek identification of their check off contributors' current employers.

A political committee treasurer satisfies the FECA's obligation to report to the Commission the name, address, occupation, and employer of donors giving more than \$200 in a single year if the treasurer shows that "best efforts have been used to obtain and submit the information" 2 U.S.C. § 432(i).

The Commission recently comprehensively amended its regulations enumerating what a treasurer must do to fall within the "best efforts" rule's safe harbor. See 58 Fed. Reg. 57,725 (Oct. 27, 1993). The new regulations are set out at 11 C.F.R. § 104.7(b) (1995). In brief, the regulations state that any solicitation must clearly request a "contributor's full name, mailing address, occupation, and name of employer" If the contributor fails to provide that information, the treasurer must make an additional communication to the contributor directed exclusively to obtaining the missing information (but, the communication may offer thanks for the contribution). See *ibid.*

The Court of Appeals for the District of Columbia Circuit recently confirmed that the FECA provides the Commission with the administrative flexibility to ensure that its "best efforts" rule does not end up subjecting a political committee, such as SPAD, to hollow and burdensome requirements. Republican Nat'l Com'tee v. Fed. Election Comm'n, 76 F.3d 400 (D.C. Cir. 1996), reviewed the FECA and concluded that, "Inherently general and open-ended, the phrase 'best efforts' is well-suited to administrative refinement." 76 F.3d at 405.

The D.C. Circuit's review of the FECA's purposes and legislative history yielded the same conclusion. Republican Nat'l Com'tee explained, in the words of the provision's congressional sponsor, that the "best efforts" rule was "an 'anti-nit-picking amendment,' which 'merely says that if a finding is made that they tried in good faith to comply with the law they shall not be harassed.'" Id. (quoting 122 Cong. Rec. 7922-23 (1976) (statement of Sen. Packwood)).

Simply put, there is no indication in the FECA or its legislative history that Congress ever considered if and how the Act's disclosure obligations should apply to

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itinerant workers. Nor does the administrative history of any version of the Commission's "best efforts" regulation address this unique issue. It is appropriate for an agency to make "ad hoc exceptions to a regulation" if the affected "party is in fact differently situated than those to whom the regulation is applied" Taylor v. Md. School for the Blind, 409 F. Supp. 148, 154 (D. Md.) (relying on American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970)), aff'd, 542 F.2d 1169 (4th Cir. 1976).

SPAD should not be put to the burden of trying to seek employer information for its itinerant check off contributors because that information, if it is available at all, is inaccurate and valueless. As explained above, an SIU mariner will not have an employer when the SIU's vacation plan remits the checked off portion of his or her vacation pay to SPAD. The mariner will just have ended his or her trip (and employment relationship) at that time. But it is no more revealing, or accurate, for SPAD to report that its check off contributor is unemployed.

It is similarly unlikely that an SIU member will have had an employer when he or she authorized SPAD check off contributions to be made. SPAD's practice is to solicit an SIU member to participate in its check off program when he or she applies for vacation pay. To reiterate, when an SIU member applies for vacation pay, he or she has generally just been discharged from employment with a shipping company and is "on the beach" beginning to await new employment with a new employer.

Asking an employee to identify his or her last (or next) employer at the time he or she authorizes check off contributions provides no information of any utility to the Commission or the public. As explained above, an SIU member's former employer will most often not be his or her next employer. Nor will the employee be privy, in most instances, to the identity of his or her next employer. Finally, a contributor for whom SPAD incurs the Commission's "best efforts" reporting obligations will generally have made more than one trip at sea (and have had more than one employer) in the process of accruing sufficient vacation pay that over \$200 of it will be checked off. Thus, any determination of which employer to disclose is artificial. The most precise formulation of such a contributor's employment status is that he or she is employed by "various U.S.-flag vessel operators."

SPAD's solicitation elicits, and the public record discloses, the most concrete identifying information for SPAD check off contributors of over \$200 annually. SPAD's report identifies them by name, address, and occupation. Their affiliation with the SIU is reasonably evident from their contribution to SPAD. A union mariner's more concrete and specific job-related affiliation is, in any event, with his or her union and regional hiring hall, although neither can be seen as the contributor's employer. Requiring more and irrelevant information about one stint of a mariner's employment

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that might somehow be seen to coincide with his or her check off contribution's reaching \$200 would, in Senator Packwood's words, be "nit picking."

Courts have been loath to impose hollow and burdensome requirements on separate segregated fund check off activity. In Michigan State AFL-CIO v. Miller, 891 F. Supp. 1210 (E.D. Mich. 1995), the court, applying strict first amendment scrutiny, struck down as overburdensome and thus unconstitutional a Michigan law that would have required a separate segregated fund annually to reaffirm its members' decision to participate in a reverse check off contribution program. The same considerations argue against the Commission's requiring SPAD to seek to obtain non-current employer information, if such information can be obtained at all, from its itinerant check off contributors. Cf. Brown v. Socialist Workers '74 Campaign Com'tee, 459 U.S. 87 (1982) (normally constitutional FECA disclosure requirements cannot be applied where they would impose a unique and impermissible burden on a specific entity's first amendment rights). And, in a more general context, the D.C. Circuit has held that, "Where any administrative rule, although considered generally in the public interest, is not in the public interest as applied to particular facts, an agency should waive application of the rule." P & M Temmer v. F.C.C., 743 F.2d 918, 929 (D.C. Cir. 1984).

Conclusion

For the foregoing reasons, we respectfully request that the Commission issue an advisory opinion concluding that SPAD has made "best efforts" to identify its merchant mariner check off contributors if it seeks their names, addresses, and occupations and reports that they are employed by "various U.S.-flag vessel operators."

Respectfully submitted,

BRAND, LOWELL & RYAN, P.C.



Stanley M. Brand
David E. Frulla

SMB:DEF/mtl

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May 24, 1996

BY HAND DELIVERY

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Associate General Counsel
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*Supplement to
AOR 1996-25*

RECEIVED
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COMMISSION
OFFICE OF GENERAL
COUNSEL
MAY 24 4 10 PM '96

Re: Supplement to Our Request for an Advisory Opinion on Behalf of the
Seafarers Political Activity Donation

Dear Mr. Litchfield:

We are submitting this letter to supplement our request for an advisory opinion, dated May 9, 1996, on behalf of the Seafarers Political Activity Donation ("SPAD"), the separate segregated fund of the Seafarers International Union ("SIU").

Upon receiving our request for an advisory opinion, you orally communicated two follow-up questions. This letter responds to the questions you raised and provides additional information that, based on certain observations you made when we spoke, should assist the Commission's consideration of our advisory opinion request. We would respectfully request that this letter be included in the record as a supplement to our advisory opinion request.

Turning to your specific questions, you first asked how many SIU-contracted companies there are. Approximately one hundred companies have contracted with the SIU to obtain the referral of SIU members for employment.

Second, you asked who withholds taxes for rotary crewed SIU members. Individual SIU-contracted employer companies withhold and remit federal tax and FICA tax payments for their employees. The SIU does not do so. Furthermore, not all companies that contract with the SIU agree to participate in the SIU Vacation Plan, the locus of SPAD check off activity.

For its part, the SIU Vacation Plan only withholds federal income tax and FICA, at uniform rates, from a mariner's vacation paycheck. We would note that, as a labor-management employee benefit plan, the SIU Vacation Plan must by law (e.g.,

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ERISA) maintain an accounting and oversight structure that is separate from the SIU. The Vacation Plan is actually administered not by the SIU, but by a board of trustees comprised in equal part of management and union representatives.

Additionally, as we explained in our advisory opinion request, there exists no integrated system within the SIU Vacation Plan that provides a comprehensive chronological listing of employers for each rotary crewed employee. The Vacation Plan maintains a comprehensive listing only of the number of days that a mariner has worked for employers participating in the Vacation Plan and the mariner's job category/pay grade.

Further complicating any effort to reverse arrange the name of an employer to put on SPAD's forms, an SIU mariner must, in general, work 120 days for participating employers to be entitled to a vacation paycheck from which he or she can opt to have a SPAD donation checked off. Because almost all rotary crewed jobs do not last for 120 work days, employees can and generally do combine their employment days with various signatory companies to qualify for vacation benefits from the Plan. And, because check off contributions are usually fifty cents per day worked, it generally takes more than one vacation paycheck (with time accumulated from at least two different sets of employers) before an individual's annual check off contribution would exceed \$200, thus triggering any requirement that SPAD seek out the name of a contributor's employer in the first place. Adding yet another layer of complexity, not all mariners check off fifty cents per day worked. All of this analysis becomes moot anyway, however, because, as we explained in our advisory opinion request, an individual is generally not employed by any company when he or she receives a vacation paycheck and a check off contribution is remitted to SPAD. At that time, the individual is "on the beach."

We hope the foregoing letter both fully answers the questions you raised and provides additional information that will enable the Commission to correctly understand how the SIU Vacation Plan and SPAD check off operate in context.

Respectfully submitted,

BRAND, LOWELL & RYAN, P.C.

A handwritten signature in black ink, appearing to read "Stanley M. Brand", with a long horizontal flourish extending to the right.

**Stanley M. Brand
David E. Frulla**